No. 98-1417

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT CLARK COUNTY DEPARTMENT OF AVIATION

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REASONS FOR DENYING THE PETITION FOR A WRIT

This case involves no legal issues that would warrant issuance of a writ of certiorari. Instead, the decision at issue involved the straightforward application of case-specific facts to well-established case law regarding whether agency action is "unreasonably delayed" under section 706(1) of the Administrative Procedure Act ("Section 706(1)"). 5 U.S.C. § 706(1). Further, there are no splits of authority between this case and other Circuits or other legal issues of national importance.

Petitioners Grand Canyon Trust, *et al.* ("Trust"), claim that the Federal Aviation Administration ("FAA") and the National Park Service ("NPS") have unreason-

ably delayed promulgating regulations to "substantially restore the natural quiet" of Grand Canyon National Park ("Grand Canyon"). The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") found no unreasonable delay and dismissed the Trust's petition for review. *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir 1998), Trust Petition for a Writ of Certiorari ("Trust Pet.") at App. A.

The Trust's chief charge of error to this Court is that the decision in this case was a departure from D.C. Circuit precedent regarding "unreasonable agency delay." The Trust has based its unreasonable delay argument almost exclusively on counting the number of years that will elapse between the enactment of the National Parks Overflights Act of 1987, P.L. 100-91, 101 Stat. 674 (the "Overflights Act"), and the 2008 "goal" that President Clinton set for NPS and FAA to attain the "substantial restoration of the natural quiet" required by the Overflights Act.

However, as discussed below, the Trust fundamentally misreads both the decision in this case and D.C. Circuit precedent. The D.C. Circuit's decision was consistent with its own precedent and the requirements of Section 706(1).

Accordingly, Respondent Clark County Department of Aviation strongly recommends that this Court deny the Trust's Petition for a Writ of Certiorari.[1]

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[1] The Clark County, Nevada, Department of Aviation ("Clark County") appeared as a party to this case before the D.C. Circuit. On February 24, 1997, Clark County submitted a petition for review of the same FAA final rule that the Trust challenged. The D.C. Circuit consolidated review of the matters on May 15, 1997. In addition, Clark County filed a motion to intervene on behalf of the government in the Trust's challenge on April 25, 1997. The D.C. Circuit granted that motion on May 15, 1997.

I. THE DECISION BELOW PROPERLY APPLIED THE FACTS OF THIS CASE TO ESTABLISHED PRINCIPLES OF LAW REGARDING REVIEW OF ALLEGED AGENCY DELAY

Fifteen years ago, the D.C. Circuit organized into a single test its precedent regarding "unreasonable" agency delay under Section 706(1). *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). Since *TRAC* was decided, the D.C. Circuit and other federal courts have applied the *TRAC* test repeatedly without significant variation from the original test. The D.C. Circuit's dismissal of the Trust's petition represented another example in a long line of straightforward applications of the *TRAC* precedent. The decision never suggested that the court considered that it was diverging in any way from its line of "unreasonable delay" precedent or limiting the ability to challenge agency delay.

A. The D.C. Circuit's Test for "Unreasonable Delay" Requires a Case-by-Case Assessment of the Circumstances Surrounding Agency Delay

The D.C. Circuit based its analysis in *TRAC* on an understanding that courts owe administrative agencies considerable deference in setting schedules for agency action. Thus, only extreme cases of agency delay justify judicial intervention in the form of mandamus. *TRAC*, 750 F.2d at 79. *See also In re International Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (mandamus based on "unreasonable delay" is reserved for "extraordinary circumstances"); *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) ("Any discussion of the standards relevant to the issue of delay must begin with recognition that an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings.").

Based on this understanding of the limits of the judicial role and the Section 706(1) cases that preceded *TRAC*, the D.C. Circuit identified "hexagonal contours of a standard" for assessing agency delay. *TRAC*, 750 F.2d at 80. The D.C. Circuit often describes these "hexagonal contours" as follows:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Action on Smoking and Health ("ASH") v. OSHA, 100 F.3d 991, 994 n.1 (D.C. Cir. 1996) (quoting *TRAC*, 750 F.2d at 80).

The court has often identified—as the Trust cites with great emphasis—a baseline assumption that matters "will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade." *TRAC*, 750 F.2d at 80 (quoting *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)). However, the D.C. Circuit has made clear that it has "*no per se rule as to how long is too long*" for agency action, because "unreasonable delay"

determinations must be based on the totality of the case-specific factors.[2] *International Chem. Workers*, 958 F.2d at 149 (emphasis added). *See also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("the issue of whether delay is unreasonable necessarily turns on the facts of each particular case"). "We did not . . . intend to create a per se rule limiting agency action to nine years . . . ." *Cutler*, 818 F.2d at 897 n.156.

For example, in a complex rulemaking regarding occupational exposures to radon, the D.C. Circuit found no unreasonable delay in an agency's projected completion of the rulemaking seven years after its start—even though "human life and health [were] at stake." *Oil, Chem. and Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985). Therefore, in the absence of a detailed understanding of the precise facts behind each case, the Trust's simple recitation of some of the time periods which the D.C. Circuit has found in various cases to constitute "unreasonable delay" provides very little guidance for assessing FAA's and NPS's delay. Trust Pet. at 15.

B. The Trust Failed to Make a Compelling Case to the D.C. Circuit for Judicial Intervention in Ongoing Rulemakings

It is incumbent on petitioners in an agency review matter to develop the bases for the relief they seek. Nevertheless, the Trust's briefs failed to demonstrate to the D.C. Circuit that delays by FAA and NPS were unreasonable enough to justify judicial intervention.

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[2] The oft-cited "reasonable time" dicta came specifically from the telecommunications ratemaking context. *TRAC*, 750 F.2d at 80; *MCI*, 637 F.2d at 340. The different statutes, interests and issues involved in ratemaking versus non-ratemaking matters suggest that caution is necessary before applying too much weight to the dicta outside of the ratemaking context.

The Trust's principal brief to the D.C. Circuit neither mentioned nor analyzed the *TRAC* factors. Brief for Petitioners Grand Canyon Trust, *et al.*, at 16-17, *Air Tour Coalition*, 154 F.3d 455. Instead, its discussion in favor of judicial intervention was compressed into a page and one-half. *Id.* Almost a page of that discussion consisted of a detailed description of the substantive regulatory elements the Trust wanted the D.C. Circuit to order FAA and NPS to implement. *Id.* The whole of the Trust's legal argument in the principal brief supporting its Section 706(1) position was as follows:

> Indeed, the need for a Court order requiring prompt agency compliance with the statute is compelling. While the agencies have engaged in a decade of unauthorized delay, natural quiet at the Park has steadily deteriorated and the number of overflights has tripled. The Court should not permit another year to go by while one of the Nation's greatest natural treasures remains unrestored for enjoyment by the American people in the way Congress intended. This is particularly so since there are obvious, easy remedies available to achieve a significant amount of the return to natural quiet Congress ordered, *e.g.*, an expedited conversion to quiet aircraft, and immediately establishing flight-free zones sufficiently large that 50% of the Park is noise free.

Id. at 16. The Trust's reply brief added nothing to the "unreasonable delay" argument. Final Reply Brief for Petitioners Grand Canyon Trust, *et al.*, *Air Tour Coalition*, 154 F.3d 455.

Given D.C. Circuit precedent that judicial intervention during the course of ongoing agency rulemaking is reserved for "extraordinary circumstances" based on the six *TRAC* factors, *e.g.*, *International Chem. Workers,*

958 F.2d at 1149, the Trust's argument provided the D.C. Circuit little to work with as a basis for finding the agencies' schedule unreasonable.

C. The D.C. Circuit Properly Applied the Facts of This Case to Well-Settled Precedent to Dismiss the Trust's Petition for Review

Despite the Trust's lack of analysis, the D.C. Circuit carefully reviewed its "unreasonable delay" argument based on the principles of *TRAC* and its progeny. The D.C. Circuit applied *TRAC's* reasoning to the delay identified by the Trust to conclude that the Trust had not demonstrated that FAA's and NPS's delay crossed the line into unreasonableness. The court determined that the large potential for unintended consequences—including safety risks to air-tour passengers—from an order requiring expedited development of regulations outweighed any factors suggesting the unreasonableness of FAA and NPS delay. *Air Tour Coalition*, 154 F.3d at 476-77, Trust Pet. at 35a-39a.

"[W]e are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case." *Id. at* 476, Trust Pet. at 35a. *See also Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) ("OSHA not only possesses enormous technical expertise we lack, but must juggle competing rulemaking demands on its limited scientific and legal staff.").

1. *The D.C. Circuit Carefully Considered the Amount of Time FAA and NPS Are Taking to Develop Regulations*

As part of its assessment of the first two *TRAC* factors (the "rule of reason" for agency delay and guidance from the statute at issue), the court acknowlegded that

FAA and NPS have been slow in developing a set of Grand Canyon overflight regulations. However, the court correctly observed that the Overflights Act contains no mandate regarding precisely when the "substantial restoration of the natural quiet" contemplated by the Act must be achieved. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a.

"Indeed, the provision [in the Overflights Act] for a report [to Congress], which was to discuss whether the plan had succeeded and suggest revisions, makes clear Congress contemplated that the agencies' first plan [from 1988] might not succeed and might have to be revised—as the agencies have done in the regulatory plan at issue here." *Id.* Further, the Overflights Act required that progress on noise objectives not come at the expense of aviation safety and contemplated that tours would continue to provide visitors an opportunity to experience the Grand Canyon from the air. *Id.* at 460, 475, Trust Pet. at 4a, 34a. These statutory imperatives increased the complexity of rulemaking and the time necessary to complete it.

The Court also properly distinguished between two separate conceptual issues that the Trust conflates in its argument that a 21-year delay is at issue: (1) how long it takes for the agencies to conclude the rulemaking process to issue a set of overflight regulations; and (2) how long the regulations will take to attain fully the Overflights Act goals. *Id.* at 477, Trust Pet. at 37a. Only the first question—the time it takes to develop regulations—is covered by the "unreasonable delay" test. The second question is substantive: whether the regulations an agency or agencies ultimately promulgate reasonably implement the underlying statute or are instead arbitrary and capricious.

The agencies have been working four and a half years since NPS reported to Congress that the original 1988 regulations had not been sufficient to substantially restore natural quiet. *Id.* at 461-62, Trust Pet. at 5a-6a. While certainly a considerable period of time, it is well within the envelope of D.C. Circuit precedent regarding actions not constituting unreasonable delay. *E.g., Zegeer,* 768 F.2d at 1488 (delay of seven years in promulgating highly complex rule was not unreasonable, even though human lives and health were at stake). Because the delay analyzed in the cases cited by the Trust to establish a range for reasonable delay did not include the time after promulgation necessary to attain the substantive goal, the Trust's comparison of those cases to the 21-year period in this case is spurious. Trust Pet. at 15.

2. *The D.C. Circuit Addressed the Nature of the Interests Affected by Any Delay*

In addition to the number of years the agencies have been working on the overflights issue, the court also considered the types and extent of the interests that were prejudiced by any delay. *See TRAC,* 750 F.2d at 80 (courts should consider nature of interests involved). The court noted that this was not the sort of situation in which federal agencies have done nothing to address the issue in front of them. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a. The agencies have promulgated two rules, the rule to satisfy the immediate requirements of the Overflights Act in 1988 and the rule under review, that together have significantly curtailed noise in the Grand Canyon, even if not to the level the Trust seeks. *Id.* FAA and NPS have committed to promulgating the additional rules necessary to attain their definition of a "substantial restoration of the natural quiet" under the Overflights Act. *Id.* at 478, Trust Pet. at 39a.

Further, the court's opinion correctly observed that "there are a number of back-country areas of the Park that experienced almost a complete absence of aircraft sound even under the previous rule." *Id.* at 474 n.17, Trust Pet. at 31a n.17. Thus, the Trust's members can go places in the Grand Canyon to experience the natural quiet they seek, because the FAA's rules to date have already achieved much of the substantial restoration of the natural quiet. The 1997 FAA rule that was under review by the court will make *87 percent* of the Grand Canyon completely free of flights. *Id.* at 476, Trust Pet. at 35a. It is often the last few percent of a problem that are the most difficult to solve.

Thus, the nature of the interests at stake in this case contrast starkly with other contexts the D.C. Circuit has addressed, where human lives and businesses were literally in the balance pending a timely decision. *E.g., Brock,* 823 F.2d at 628 ("lives [are] hanging in the balance"); *Zegeer,* 768 F.2d at 1488 ("human life and health are at stake"). Indeed, the only human lives at stake in this rulemaking are passengers and pilots who may be imperiled by hasty action to reconfigure airspace in the Grand Canyon region. *See, e.g.,* 62 Fed. Reg. 26,902-26,904 (May 15, 1997) (closure of some current aircraft routes in the Grand Canyon could "lead to a mid-air collision"). This is not the type of case where an agency effectively loses the ability to regulate by waiting too long to act. *See, e.g., In re Center for Auto Safety,* 793 F.2d 1346, 1353-54 (D.C. Cir. 1986) (repeated failure to promulgate annual regulations with sufficient time to allow industry compliance undermined ability to regulate at all). The transient nature of noise and quiet mean that aircraft noise causes no permanent or cumulative effects in the Grand Canyon.

Another relevant consideration in the court's assessment of the interests at stake was the fact that the Trust's 1997 petition for review was the first petition complaining about the lack of agency action addressing Grand Canyon overflights. *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a. *See also Washington Legal Found. v. Alexander,* 984 F.2d 483, 488 (D.C. Cir. 1993) (considering non-existence of prior lawsuits). While the court noted that this did not estop the Trust from filing suit, it did observe that "this is not a case where an agency has been contumacious in ignoring court directions to expedite decision-making." *Air Tour Coalition,* 154 F.3d at 477, Trust Pet. at 37a-38a. Further, the fact that it took until 1997 for the Trust or other parties to complain about alleged delay suggests that the harm from any such delay was not particularly great.

3. *The D.C. Circuit Correctly Determined that the Disadvantages of Undue Haste Made FAA's and NPS's Rulemaking Schedule Reasonable*

Of perhaps the greatest importance to the court, however, was its assessment that it had a limited ability to expedite rulemaking judicially without causing collateral harm. "The issues involved here are complex. It is clear from the record that achieving substantial restoration will require a multitude of agency actions, including the entry into service of quieter aircraft. Nothing in the Trust's submissions demonstrate that this can be achieved 'immediately.'" *Air Tour Coalition,* 154 F.3d at 476, Trust Pet. at 38a.

> As a court we have no idea what the unintended consequences of immediately imposing an expansion of the flight free zones—which under the Final Rule already will cover 87% of the Park—might be. In addition to air safety concerns, it is possible that im-

> plementing such zones would do no more than shift the flights and their noise from the Park to the Hualapai [Indian] Reservation. Nor do we know what the consequences of ordering a cap on flights would be, or whether there might be other regulations that could better do the job. That, of course, is why such considerations normally are the province of expert agencies rather than the courts—and, as noted above, the FAA currently is considering such options. Moreover, although the Trust's frustration with the agencies' slow and faltering pace is understandable, we cannot say it has made out the case for the immediate imposition of so drastic a remedy.

Id. at 476, Trust Pet. at 35a-36a.

The court was aware through prior briefing that FAA had determined that flight-free zone changes could imperil flight safety and that the Hualapai Indian Tribe raised legal questions about shifting noise to their Reservation. Brief of Petitioners/Intervenors Clark County Dep't of Aviation and Las Vegas Convention and Visitors Auth. at 8, *Air Tour Coalition,* 154 F.3d 455; Principal Brief of Petitioner-Intervenor Hualapai Indian Tribe, *Air Tour Coalition,* 154 F.3d 455.[3] The court also recognized that Grand Canyon overflight regulation was originally designed to *promote* air-tour safety and that the Overflights Act explicitly provided that "natural quiet" restoration

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[3] Clark County called the court's attention to a recent FAA Federal Register notice in which FAA indicated its position that some flight-free zone expansions and route closures could cause "the potential for unsafe operating conditions" that "could lead to mid-air collision." 62 Fed. Reg. 26,902, 26,904 (May 15, 1997). The Hualapai Tribe argued that the effect of expanding flight-free zones in the Grand Canyon would be to shift noise to their Reservation, in violation of federal trust obligations to the Tribe and a number of procedural statutes designed to protect the Tribe. Hualapai Br. at 7-25.

was not to be achieved at the expense of safety. *Air Tour Coalition,* 154 F.3d at 460, Trust Pet. at 2a-4a.

These are precisely the sorts of assessments that D.C. Circuit precedent required the court to make. One of the essential ingredients in assessing the "reasonableness" of agency "delay" is to determine whether there is any reasonable way to reach closure on an issue (1) faster than the agency's current schedule and (2) without creating new problems. *See, e.g., In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988) ("The reasonableness of a delay depends in part on the potential impact of any attempt to accelerate the progress of the matter in question on other agency activities of equal or higher importance . . . ."); *In re United Steelworkers of America,* 783 F.2d 1117, 1120 (D.C. Cir. 1986) (complexity of the matter suggested that there was no value to be gained from moving on a faster schedule). If a court cannot identify a better procedural or substantive way to proceed, it is hard to characterize as unreasonable the time agencies are taking to address a problem.

Like physicians, courts' first principle should be to do no harm. "[J]udicial imposition of an overly hasty timetable . . . would ill serve the public interest. The rule ultimately promulgated by the agency, not to mention the agency's rationale for the rule, must be constructed carefully and thoroughly if the agency's action is to pass judicial scrutiny . . . ." *United Steelworkers,* 783 F.2d at 1120.

Contrary to the Trust's argument, the D.C. Circuit often cites the complexity and technical nature of a matter as a mitigating or exculpatory circumstance in cases of agency delay. *See, e.g., Sierra Club v. Thomas,* 828 F.2d 783, 798 (D.C. Cir. 1987) ("EPA must be afforded the

amount of time necessary to analyze such [complex technical] questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion."); *Zegeer*, 768 F.2d at 1488 ("due to complex scientific and technical issues, the difficulty and uncertainty inherent in the venture caution us against second-guessing MSHA's judgment" regarding agency's proposed rulemaking schedule).

The D.C. Circuit reasonably determined that the Trust had not shown that FAA's and NPS's rulemaking schedule was unreasonable, because the Trust had not demonstrated a better way to achieve the multiple ends of the Overflights Act.[4] When viewed in the context of D.C. Circuit precedent, the court's decision was an unremarkable application of well-established principles.

D. The D.C. Circuit Reasonably Dismissed the Trust's Petition Based on Agency Representations Regarding Rulemaking Intentions

The D.C. Circuit's decision to "take the government at its word" (Trust Pet. at 17) that it would meet the Overflights Act requirements through its ongoing rulemakings was also reasonable and consistent with precedent. In cases of alleged unreasonable delay, the D.C. Circuit regularly relies upon assurances by agencies regarding their intentions for future action. *See, e.g., ASH*, 100 F.3d at 994-95 (court relied on agency assurances re-

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[4] FAA indicated in its rulemaking that the "unambiguous intent of [the Overflights Act] with respect to the Grand Canyon was for the FAA to work with the NPS to devise a plan that would *safely* provide for a substantial restoration of natural quiet *while maintaining a viable tour industry*." 61 Fed. Reg. 69,302, 69,306 (Dec. 31, 1996) (emphasis added). Although the Trust argued that consideration of air-tour interests was invalid, the D.C. Circuit rejected that argument because the Overflights Act contemplated the continuation of Grand Canyon air tours. *Air Tour Coalition*, 154 F.3d at 475, Trust Pet. at 34a. The Trust does not address this issue in its writ petition to this Court.

garding progress); *United Steelworkers*, 783 F.2d at 1119-20 (court relied on schedule proffered by agency to reject mandamus relief); *TRAC*, 750 F.2d at 80 ("Because . . . FCC has assured us that it is moving expeditiously . . . we need not test the delay here against the above standard to determine if it is egregious enough to warrant mandamus.").

Contrary to the Trust's argument that the D.C. Circuit has given FAA and NPS an "open-ended" standard for unreasonable delay in this case, Trust Pet. at 17, the court clearly indicated that the agencies could not wait forever to promulgate rules. It thus indicated that the Trust could again petition the court for an order compelling agency action if the agencies take an unreasonably long time to complete rulemaking. *Air Tour Coalition*, 154 F.3d at 478, Trust Pet. at App. 39a.

The D.C. Circuit frequently invites petitioners to file supplemental petitions under Section 706(1) as a way of ensuring that agencies keep to a reasonable schedule. *E.g., Zegeer*, 768 F.2d at 1488 ("if MSHA should fail to act with appropriate diligence in following the estimates it has tendered to this court, petitioners may invoke our authority to direct MSHA to complete the rulemaking process with due dispatch"). This approach is sound. The D.C. Circuit should not have to act as the master scheduler for federal agencies. If agencies are on a reasonable course for completion of agency action, it would be inappropriate for courts to automatically assume that agencies will deviate from that course.

E. The D.C. Circuit's Denial of the Trust's Request to Retain Jurisdiction was Consistent with Precedent

The Trust also incorrectly claims that the D.C. Circuit broke with established practice by not retaining jurisdiction to ensure that FAA and NPS make progress towards

completing their rulemakings. Trust Pet. at 18. The D.C. Circuit often relinquishes jurisdiction in cases where agencies assert that they are on a reasonable path to complete agency action. *E.g.*, *ASH*, 100 F.3d at 994-95 ("we are not prepared to use ASH's mandamus petition as a basis for exercising judicial supervision"); *United Steelworkers*, 783 F.2d at 1120 ("We likewise fail to perceive any useful purpose in retaining jurisdiction or requiring periodic progress reports, as requested by petitioners."). As in the instant case, the Court has often relinquished jurisdiction with the understanding that "we leave the courthouse door open to petitioners to renew their petition for mandamus if [the agency] should 'fail to act with appropriate diligence in following the estimates it has tendered to this court.'" *United Steelworkers*, 783 F.2d at 1120 (quoting *Zegeer*, 768 F.2d at 1488).

The court appropriately assesses the necessity and propriety of retaining jurisdiction on a case-by-case basis. *See, e.g., id.* The D.C. Circuit has been more likely to retain jurisdiction where it believes there are indications of bad faith on the part of an agency. *See, e.g., Monroe Communications*, 840 F.2d at 947 (court retained jurisdiction solely because of unrebutted allegations of agency bad faith). The D.C. Circuit has suggested that it is less likely to retain jurisdiction if it does not appear that agency delay is a matter of bad faith or if the remaining issues before an agency are complicated. *E.g., id.* at 947 ("the unusual circumstance of an unrebutted allegation of bad faith leads us to retain jurisdiction"; "[r]etention might be impractical were many difficult and delicate issues still outstanding").

In the instant case, the D.C. Circuit did not face any evidence of bad faith on the part of FAA or NPS. At

the same time, the court recognized the complexity and difficulty of the issues that the agencies still face in developing overflight regulations that would meet natural quiet goals without creating unacceptable safety problems, unnecessary economic dislocation or impacts to Native American interests. In this context, the decision by the court to deny the Trust's request for retained jurisdiction is both reasonable and well within the range of precedent.

II. THIS CASE RAISES NO LEGAL ISSUES OF NATIONAL IMPORTANCE THAT WOULD JUSTIFY ISSUING A WRIT OF CERTIORARI

As discussed above, the decision in this case was a reasonable application of a particular set of facts to well-settled law regarding "unreasonable delay." The opinion neither created new legal principles nor called into question any old ones. The Trust identifies no conflicts that the *Air Tour Coalition* decision would create with other Circuits. Accordingly, there is no reason for the Court to burden its docket with the review of a straightforward application of facts to law.

A. The Trust Has Identified No Conflicts Between This Case and Precedent from Other Circuits

The Trust's argument is structured at points to suggest (without explicitly claiming) that the D.C. Circuit's decision in this case is at odds with a recent decision of the Tenth Circuit, *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1998). *E.g.*, Trust Petition at 12-13. However, *Forest Guardians* addressed only the "unlawfully withheld" prong of Section 706(1)[5] in its finding that courts must compel action if an agency misses a

[5] Section 706 provides in relevant part: "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed . . . ." 5 U.S.C. § 706(1).

specific statutory deadline. *Forest Guardians,* 164 F.3d at 1272-73. The Tenth Circuit opined in dicta that, in "unreasonable delay" cases, Section 706(1) "leaves in the courts the discretion to decide whether agency delay is unreasonable." *Id.* at 1272.

Because the Trust correctly concedes that its argument arises out of the "unreasonable delay" provision of Section 706(1), Trust Pet. at i, there is no conflict between the instant case and *Forest Guardians.* Even if a split between the Circuits does exist regarding whether courts have any discretion not to compel agency action under the "unlawfully withheld" provision of Section 706(1), this case is not an appropriate vehicle to resolve such conflict.

B. The Trust's Proffered Grounds for the National Importance of This Case Are Unconvincing

The Trust strains credibility to identify two bases to support its request for this Court to exercise its jurisdiction. First, it argues that the D.C. Circuit's role as the tribunal "which has the primary, often the solitary, word on the question presented" elevates this case to national importance. Trust Pet. at 19. Second, the Trust argues that the fact that the Grand Canyon is a national treasure, coupled with Congress' specific desire to regulate air tours in the Grand Canyon, makes this a "more important case for deciding whether the Court of Appeals' interpretation of its obligations under the APA was correct." *Id.* at 20.

Neither argument would justify asserting jurisdiction in this case. The fact that this case came from the D.C. Circuit should make little difference to this Court's disposition of the writ petition. Contrary to the Trust's argument, the D.C. Circuit does not have the "primary" or "solitary" word regarding either aircraft noise or "un-

reasonable delay" under the APA. Petitions for review of FAA action or inaction—including actions under the Overflight Act—can be brought either in the D.C. Circuit or the geographic Circuit in which a petitioner resides. 49 U.S.C. § 46110(a).

Further, the D.C. Circuit has no monopoly on enforcement of Section 706(1). The other Circuits consider Section 706(1) issues regularly, even if not as frequently as the D.C. Circuit. *E.g., Independence Mining Co. v. Babbitt,* 105 F.3d 502 (9th Cir. 1996); *In re City of Virginia Beach,* 42 F.3d 881 (4th Cir. 1994). While the other Circuits undoubtedly consider D.C. Circuit decisions persuasive due to the D.C. Circuit's expertise in administrative matters, they are hardly bound by these decisions, as seen by the Tenth Circuit's analysis of the Section 706(1) "unlawfully withheld" provision in *Forest Guardians,* 164 F.3d at 1272-73.

The observation that the D.C. Circuit handles a disproportionate share of administrative review cases makes little difference because the decision under review breaks no new legal ground. As discussed above, the D.C. Circuit's decision in the instant matter was an application of particular facts to well-settled D.C. Circuit principles that the Trust does not challenge. In this context, the Trust's argument is no more than an exhortation that this Court should review *all* D.C. Circuit administrative decisions because of the importance of that court's administrative docket.

The Trust's last argument—that the Court should grant the petition for a writ of certiorari because this case is about the Grand Canyon—is even less persuasive. No one would disagree that the Grand Canyon is important. However, the Grand Canyon itself is not injured by air-

craft noise and is thus not really the issue in this case. Further, the fact that the Grand Canyon is a national treasure does not mean that the decision at issue raises any "important question *of federal law*" that should be addressed by this Court. Sup. Ct. R. 10(c) (emphasis added).

CONCLUSION

For the reasons outlined above, the Court should deny the Trust's petition for a writ of certiorari.

Respectfully submitted,

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